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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

KOUEI SAETERN,

Defendant and Appellant.

C082153

(Super. Ct. No. 10F07335)

A jury found defendant Kouei Saetern guilty of three counts of murder with special circumstances. On appeal, defendant contends: (1) the trial court prejudicially erred in admitting evidence of an uncharged attempted murder; (2) trial counsel rendered ineffective assistance of counsel by failing to object to prosecutorial misconduct in closing argument; (3) defendant was improperly convicted of more than one multiple-murder special circumstance; (4) the restitution award is not based on substantial evidence; (5) the restitution fine should be reduced to \$200; (6) defendant's parole revocation fine should be stricken; and (7) the matter should be remanded to allow the trial court to consider striking the firearm enhancement pursuant to the newly enacted Senate Bill No. 620 (2017-2018 Reg. Sess.; hereafter Senate Bill 620). We will remand

the matter for a new hearing on victim restitution and to allow the trial court to exercise its discretion under Senate Bill 620; we will direct the trial court to strike two of the multiple-murder special-circumstance findings pursuant to Penal Code¹ section 190.2, subdivision (a)(3); and we will order the abstract of judgment corrected to reflect the oral pronouncement of judgment, a \$200 restitution fine, and no parole revocation fine. In all other respects, the judgment is affirmed.

RELEVANT BACKGROUND

Defendant and his wife got into an argument, she spit on him, and he punched and kicked her. His two sons came to their mother's aide. Defendant shot and killed all three. At the time of the shooting in November 2010, defendant's family included his wife Chio, then age 46, his sons Jerry, 22, and Vern, 19, and daughters Lai, 12, and Lina, six.² His nephew, Johnny Chao, 13, was also staying at the home.

While the children were watching cartoons in the living room, defendant and Chio were arguing in the master bedroom. Lina was in the master bedroom with her parents. Lina unlocked the door and let Lai into the bedroom. Lai saw defendant lying on the bed with a rifle against the wall next to the bed. Chio and defendant continued to argue. Chio spit on defendant and defendant kicked and punched her repeatedly. Chio took Lina to the living room with the other children and returned to the bedroom.

Jerry and Vern then entered the bedroom. Vern jumped on his father and tackled him while Jerry tried to get Vern off his father. Vern and defendant yelled at each other and defendant went into an unused bedroom and closed the door. Vern handed Lai the rifle and told her to hide it and she and Chao started to hide it behind a couch. Vern retrieved the rifle back and took it to his bedroom.

¹ Undesignated statutory references are to the Penal Code.

² Because multiple witnesses share the Saetern surname, we refer to them by their first names. No disrespect is intended.

After defendant went into the unused bedroom, Lai, Chao, and Lina all heard clicking sounds coming from the bedroom. Lai recognized the sound as a rifle being loaded. Vern was angry and confrontational and asked defendant, “What are you doing in there?” Defendant replied, “Why do I have to be doing anything. Why do you accuse me of doing anything.”

Defendant came out of the bedroom armed with a rifle. Vern backed up and said, “Don’t shoot. Don’t do it.” Chio, hiding behind the dining room wall, said, “Stop.” Defendant sounded angry, waved the gun, pointed it at Vern, and shot him in the stomach. Lai ran to Vern but defendant fired a shot in her direction. Chio yelled for Lina to open the front door and run. She also signaled with her hands for Lina, Lai, and Chao to get out of the house. Lina, Lai, and Chao ran out the front door as defendant fired a shot through one of the house’s two front doors.

When sheriff’s deputies responded to the scene they found defendant in the garage. Inside the house, Vern, Jerry, and Chio were all found dead from gunshot wounds. Vern’s body was facedown between one of the bedrooms and the hallway. He died of gunshot wounds to the abdomen and pelvis. Jerry’s body was facedown in the family room on top of his cell phone. He died from gunshot wounds to his chest and abdomen. Stippling on their bodies suggested they were shot from an intermediate range. Chio’s body was found in the hallway. She died from a gunshot wound to her head, with the bullet entering her mouth traveling upward. She also had gunshot wounds to her elbow and back. There was burnt gunpowder on her clothes and skin so “the barrel of the gun was fairly close to her.” Nine expended shell casings were found in the house.

A car in the garage contained an SKS rifle loaded with nine rounds and a 12-gauge shotgun in a case. A backpack in the car contained bullets and 30, 12-gauge shotgun shells. In a bedroom on a mattress was a loaded .22-caliber rifle. Two unloaded shotguns were in the closet in the master bedroom along with shotgun shells.

PROCEDURAL HISTORY

A complaint charged defendant with three counts of murder (§ 187, subd. (a)) committed on November 8, 2010. As to each count there was an enhancement allegation that defendant personally used and intentionally discharged a firearm that caused death (§ 12022.53, subds. (b)-(d)) and that the offenses together qualified as a multiple-murder special circumstance (§ 190.2, subd. (a)(3)). Defendant pleaded not guilty by reason of insanity.

The jury found defendant guilty of three counts of murder and found true the enhancement allegations for the personal use and intentional discharge of a firearm that caused great bodily injury or death and the multiple-murder special circumstance. Defendant waived his right to a jury on the sanity phase and the trial court found him sane. The trial court sentenced defendant to three consecutive terms of life without the possibility of parole plus three 25-year-to-life terms for the gun use enhancements, awarded defendant 2,021 days of presentence custody credit, and imposed “only mandatory minimum fines and fees.” The trial court also ordered defendant to pay \$23,930 in victim restitution to the Victims of Violent Crime Program.

I

Defendant contends the trial court prejudicially erred in admitting evidence of his uncharged attempted murder of Lai. Noting trial counsel did not object on the basis of Evidence Code sections 1101 or 352, defendant alternatively argues counsel was ineffective for failing to object.

Background

During Lai’s testimony, as she was describing the events of that night and specifically the first shooting of her brother Vern, she described running to Vern, and as she knelt beside him, defendant shot in her direction. As she held the door open for Lina and Chao to run out the door with her, she looked back and saw her father looking in her direction, pointing the rifle at her, and then he fired the rifle. The shot went through one

of the double doors and Lai felt it passing as she stumbled out the door. Trial counsel objected to the testimony of what was in defendant's hand on the grounds of relevance, and an unreported sidebar discussion was held. The trial court overruled the objection.

After the close of evidence, trial counsel made a point to clarify on the record the objection to Lai's testimony about the "relevance about whether she believed [defendant] shot at her." Counsel stated: "I wanted to make sure to put on the record that my objection was that [defendant] isn't charged with shooting at her or attempted murder of her. [¶] I believe that her testimony, based on--I asked--it was not relevant to the charges he's being charged with. It was speculation. [¶] And I would ask the Court, just for the record--that I think I even did ask for her testimony to be stricken, but I just want to make sure that's on the record, that I objected to that." The court indicated it had overruled "the objection because the evidence was relevant to both the witness's credibility and some of the issues in this case, including the issue of self-defense."

Analysis

On appeal, defendant argues the trial court erroneously admitted Lai's testimony that defendant shot at her, contending the evidence was irrelevant and inadmissible under Evidence Code sections 1101 and 352. We review a trial court's evidentiary rulings under these code sections for abuse of discretion. (*People v. Doolin* (2009) 45 Cal.4th 390, 437.) Trial counsel objected to this evidence only on relevancy grounds. He did not object on the basis of Evidence Code section 1101 or the perceived prejudicial effect of the evidence. Accordingly, these claims are forfeited on appeal. (*Doolin*, at p. 437; *People v. Barnett* (1998) 17 Cal.4th 1044, 1130-1131.)

Defendant next argues counsel's failure to object on Evidence Code sections 1101 and 352 grounds constituted ineffective assistance.³ We disagree.

³ Although defendant mentions Evidence Code section 1101, his argument addresses only Evidence Code section 352.

“Defendant has the burden of proving ineffective assistance of counsel. [Citation.] To prevail on a claim of ineffective assistance of counsel, a defendant ‘ “must establish not only deficient performance, i.e., representation below an objective standard of reasonableness, but also resultant prejudice.” ’ [Citation.] A court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance. [Citation.] Tactical errors are generally not deemed reversible, and counsel’s decisionmaking must be evaluated in the context of the available facts. [Citation.] To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation. [Citation.] Moreover, prejudice must be affirmatively proved; the record must demonstrate ‘a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.’ [Citation.]” (*People v. Maury* (2003) 30 Cal.4th 342, 389.) “Whether to object to arguably inadmissible evidence is a tactical decision; because trial counsel’s tactical decisions are accorded substantial deference, failure to object seldom establishes counsel’s incompetence.” (*Id.* at pp. 415-416.)

Here, a significant portion of defendant’s defense was a claim of self-defense, or imperfect self-defense. In closing argument, defense counsel argued that the evidence showed defendant had been spit upon by Chio, then tackled by his sons. Vern took the rifle from the bedroom. Vern continued to be angry and confrontational, demanding to know what defendant was doing in the bedroom. Defense counsel argued defendant could reasonably conclude his sons had attacked him and left the room with his gun. Defense counsel continued: “[Defendant’s] got his son in front of him, challenging him to a fight. He’s just been spit on. They have got a gun somewhere in that house. They have attacked him in his own room, and he pulls up the gun and shoots.” Based on

defendant's claims of self-defense and imperfect self-defense, evidence showing that defendant shot at Lai, a 12-year-old child who had not threatened him, or tackled him, or angrily confronted him, twice, while she was fleeing the house, was relevant to disprove those claims.

Moreover, this evidence, contrary to defendant's arguments, was not unduly prejudicial. “ ‘ “Prejudice” as contemplated by [Evidence Code] section 352 is not so sweeping as to include any evidence the opponent finds inconvenient. Evidence is not prejudicial, as that term is used in a section 352 context, merely because it undermines the opponent's position or shores up that of the proponent. The ability to do so is what makes evidence relevant. The code speaks in terms of *undue* prejudice. Unless the dangers of undue prejudice, confusion, or time consumption “ ‘substantially outweigh’ ” the probative value of relevant evidence, a section 352 objection should fail. [Citation.] “ ‘The “prejudice” referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, “prejudicial” is not synonymous with “damaging.” ’ [Citation.]” [Citation.] [¶] . . . [E]vidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose.’ [Citation.]” (*People v. Doolin, supra*, 45 Cal.4th at pp. 438-439.)

Here, Lai's testimony was not inflammatory, confusing, misleading, or unduly prejudicial. Certainly it would have been difficult for the jury to hear of defendant shooting at his fleeing 12-year-old daughter; but, in the context of this case, as defendant shot and killed his wife and two sons, the first killing happening in front of his two younger children and young nephew, we cannot say the evidence was likely to evoke an

emotional bias against defendant. Accordingly, defendant has failed to demonstrate that an objection on Evidence Code section 352 grounds would have been successful, and that counsel was ineffective for failing to object on those grounds. Because the challenged evidence was properly admitted, defendant's ineffective assistant claim fails.

II

Defendant contends trial counsel was ineffective in failing to object to prosecutorial misconduct in closing argument. He contends the prosecutor's statements in closing argument that defendant was "evil" and acted with "great depravity" were designed to provoke an emotional response from the jury and linked defendant's "evil" crimes to concerns about their children. Accordingly, defendant argues counsel as ineffective in failing to object.

Background

In his closing argument, the prosecutor argued: "As you listened to the evidence in this case, whether it was looking at the photos ad nauseam or the diagrams or listen[ing] to the kids testify, in any event, at some point you might have thought to yourself, you know, how can a man kill both his sons and his wife? [¶] We don't live on tree-lined streets, where children walk to school and couples walk hand-in-hand, and in the sunshine of our world, we don't want to believe that evil exists. But the fact of the matter is this: [¶] The human being is capable of such great beauty, and the human animal is capable of such great depravity." Trial counsel did not object to the prosecutor's statements.

Analysis

A prosecutor violates the federal Constitution if the prosecutor engages in " 'a pattern of conduct 'so egregious that it infect[ed] the trial with such unfairness as to make the conviction a denial of due process.' " (*People v. Gray* (2005) 37 Cal.4th 168, 215, quoting *People v. Gionis* (1995) 9 Cal.4th 1196, 1214; *People v. Zambrano* (2004) 124 Cal.App.4th 228, 241.) A prosecutor's conduct violates state law where the

defendant's trial is rendered fundamentally unfair due to the prosecutor's use of " " "deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' ' ' (*People v. Espinoza* (1992) 3 Cal.4th 806, 820.) As he acknowledges, defendant has forfeited the claim of prosecutorial misconduct by not objecting at trial below, so defendant claims this failure was ineffective assistance of counsel. But, we do not find ineffective assistance of counsel in the failure to object. As above, "deciding whether to object is inherently tactical, and the failure to object will rarely establish ineffective assistance." (*People v. Maury, supra*, 30 Cal.4th at p. 419.)

A prosecutor is permitted considerable latitude to "use appropriate epithets" during argument. (*People v. Williams* (1997) 16 Cal.4th 153, 221; *People v. Wharton* (1991) 53 Cal.3d 522, 567-568.) In view of the evidence in this case, a triple homicide of defendant's wife and two sons, in front of three young children, the prosecutor did not exceed the permissible scope of vigorous closing argument. (*People v. Farnam* (2002) 28 Cal.4th 107, 168, 199 [the defendant is a " 'beast,' " " 'monstrous,' " " 'cold-blooded,' " vicious, and a "predator"; evidence is " 'horrifying' " and " 'more horrifying than your worst nightmare' "]; *People v. Edwards* (2013) 57 Cal.4th 658, 765 [the defendant is a " 'monster' " and " 'animal' "]; *People v. Thomas* (1992) 2 Cal.4th 489, 537 [the defendant is a " 'mass murderer, rapist,' " " 'perverted murderous cancer,' " and " 'walking depraved cancer' "]; *People v. Sully* (1991) 53 Cal.3d 1195, 1249 [the defendant is a " 'human monster' " and a " 'mutation' "].) Furthermore, the remarks in this case were brief and confined to closing argument. (*People v. Smithey* (1999) 20 Cal.4th 936, 961.) And, in light of the evidence adduced in the trial of this case, those isolated comments "could not have carried such an emotional impact as to make it likely the jury's decision was rooted in passion rather than evidence." (*Thomas*, at p. 537.)

The prosecutor's arguments were not improper. Accordingly, there was no reason for counsel to object to them. Thus, the failure to object did not result in a violation of

defendant's constitutional right to the effective assistance of counsel. (*People v. Lopez* (2008) 42 Cal.4th 960, 968.)

III

Defendant contends, and the People properly concede, that defendant was improperly convicted of more than one multiple-murder special circumstance. The jury found defendant guilty of first degree murder with a multiple-murder special-circumstance finding pursuant to section 190.2, subdivision (a)(3) as to all three counts charged. Only one murder special circumstance should have been alleged and found true. (*People v. Halvorsen* (2007) 42 Cal.4th 379, 422.) The remedy is to strike the two superfluous findings. (*Ibid.*)

IV

Defendant argues the \$23,930 award of victim restitution is not based on substantial evidence. He contends the state did not comply with section 1202.4, subdivision (f)(4)(B) and provide adequate documentation of the bills paid by the California Victim Compensation and Government Claims Board (Victim Compensation Board).

Generally, section 1202.4 does not require any particular kind of proof of victim restitution, and the trial court is entitled to consider the probation report and victim statements as prima facie evidence of loss. (*People v. Millard* (2009) 175 Cal.App.4th 7, 26; *People v. Gemelli* (2008) 161 Cal.App.4th 1539, 1542-1543.) However, where, as here, the Restitution Fund has provided assistance, section 1202.4, subdivision (f)(4)(B) requires: "The amount of assistance provided by the Restitution Fund shall be established by copies of bills submitted to the [Victim Compensation Board] reflecting the amount paid by the board and whether the services for which payment was made were for medical or dental expenses, funeral or burial expenses, mental health counseling, wage or support losses, or rehabilitation. Certified copies of these bills provided by the board and redacted to protect the privacy and safety of the victim or any

legal privilege, together with a statement made under penalty of perjury by the custodian of records that those bills were submitted to and were paid by the board, shall be sufficient to meet this requirement.”

Here, the probation report indicated the amount of restitution paid by the Restitution Fund was \$23,930 and attached a memorandum from the Victim Compensation Board indicating the restitution it was seeking and delineating the types of benefits paid and the amounts. No copies of bills were attached nor was there any statement by the custodian of records.

Although the setting of restitution is largely a discretionary matter, there must be “ ‘ “a factual and rational basis for the amount of restitution ordered by the trial court.” ’ ” (*People v. Millard, supra*, 175 Cal.App.4th at p. 26.) “The burden is on the party seeking restitution to provide an adequate factual basis for the claim.” (*People v. Giordano* (2007) 42 Cal.4th 644, 664.) In this circumstance, where the board is seeking restitution for payments made to crime victims, the law is very specific as to the type of documentation the movant must provide. Despite this statutory directive, the state did not present sufficient evidence to support its claim for restitution. We therefore reverse the restitution award against appellant and remand for a new restitution hearing. (See *People v. Harvest* (2000) 84 Cal.App.4th 641, 649 [victim restitution does not constitute punishment for double jeopardy purposes]; *People v. Thygesen* (1999) 69 Cal.App.4th 988, 995-996.)

V

The parties agree the abstract of judgment and minute order must be corrected to reflect a \$200 restitution fine under section 1202.4, rather than a \$300 fine, consistent with the trial court’s oral pronouncement of judgment that “[o]nly mandatory minimum fines and fees” would be imposed. Although the trial court did not explicitly pronounce a \$200 restitution fine, it is apparent on this record that the trial court intended to impose the mandatory minimum restitution and parole revocation fine. At the time defendant

committed the offenses, the minimum restitution fine was \$200. (Former § 1202.4, subd. (b)(1), as amended by Stats. 2010, ch. 351 (Assem. Bill No. 819), § 9, eff. Sept. 27, 2010.) The abstract of judgment and minute order reflect the imposition of a \$300 restitution fine.

The abstract of judgment summarizes and must accurately reflect the oral pronouncement of judgment. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-186; *People v. Mesa* (1975) 14 Cal.3d 466, 471; *People v. Zackery* (2007) 147 Cal.App.4th 380, 389.) Where a discrepancy exists between the oral pronouncement of judgment and an abstract of judgment, the oral pronouncement controls. (*Zackery*, at p. 385.) Any discrepancy is presumed to be a clerical error, which can be corrected at any time to reflect the court's oral pronouncement. (*Mitchell*, at pp. 183, 185-188; *Mesa*, at p. 471.) Accordingly, we order the minute order and abstract of judgment be corrected to conform to the sentence actually imposed by the court, that is, to reduce the restitution fine imposed pursuant to section 1202.4 from \$300 to \$200.

VI

The parties also agree the parole revocation fine under section 1202.45 should be stricken. They correctly state a parole revocation fine is not authorized when, as here, a defendant is sentenced to a term of life in prison without the possibility of parole. (*People v. Oganessian* (1999) 70 Cal.App.4th 1178, 1183.)

Upon our review of the record, it does not appear the trial court imposed a parole revocation fine. Accordingly, the judgment is not in error. However, the abstract of judgment and minute order reflect the imposition and suspension of a parole revocation fee under section 1202.45. As above, the abstract of judgment must reflect the oral pronouncement of judgment and any discrepancy is presumed to be clerical error that may be corrected at any time. Accordingly, we order the minute order and abstract of judgment be corrected to conform to the sentence actually imposed by the court, with no parole revocation fine imposed.

VII

In supplemental briefing, defendant contends remand is appropriate in light of Senate Bill 620, which gives trial courts discretion to strike firearm enhancements. The People concede this newly conveyed discretion applies retroactively but maintain no remand would be futile “because it is clear the trial court would not exercise its discretion to strike the firearm-use enhancements.” We agree with defendant that remand is appropriate in this case.

On October 11, 2017, the Governor signed Senate Bill 620, which amends sections 12022.5 and 12022.53 to permit a trial court to strike a firearm enhancement: “The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law.” (Stats. 2017, ch. 682, §§ 1 & 2; see also §§ 12022.5, subd. (c), 12022.53, subd. (h).) The change became effective January 1, 2018. (Stats. 2017, ch. 682.)

We agree with the parties that Senate Bill 620 applies retroactively. If an amended statute “lessening punishment becomes effective prior to the date the judgment of conviction becomes final then . . . it, and not the old statute in effect when the prohibited act was committed, applies.” (*In re Estrada* (1965) 63 Cal.2d 740, 744; see also *People v. Francis* (1969) 71 Cal.2d 66, 75.) Here, the amendment took effect before defendant’s conviction became final and therefore Senate Bill 620 applies retroactively. (See *People v. Vieira* (2005) 35 Cal.4th 264, 306 [“for the purpose of determining retroactive application of an amendment to a criminal statute, a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed”].)

We disagree with the People that no purpose would be served by remand. “Generally, when the record shows that the trial court proceeded with sentencing on the

erroneous assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing.” (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.) Here, at sentencing, the trial court lacked discretion as to the firearm enhancement. Under the newly amended section 12022.53, it now has discretion. And because the record fails to foreclose the possibility of the trial court exercising discretion to strike defendant’s firearm enhancement, we will remand to permit the trial court to consider exercising its newfound discretion.

DISPOSITION

The matter is remanded to the trial court to consider exercising its discretion under Senate Bill 620 and to conduct a new victim restitution hearing. The trial court is directed to strike two of the multiple-murder special-circumstance findings pursuant to section 190.2, subdivision (a)(3). The trial court is also directed to correct the abstract of judgment and minute order to reflect the oral pronouncement of judgment imposed with respect to the restitution fine and parole revocation fine. In all other respects, the judgment is affirmed.

/s/
Blease, Acting P. J.

We concur:

/s/
Hull, J.

/s/
Mauro, J.